

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

LARRY DOUGLAS RODGERS,

Defendant-Appellant.

UNPUBLISHED

October 26, 2001

No. 225338

Oakland Circuit Court

LC No. 99-169017-FH

Before: Zahra, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of second-degree home invasion, MCL 750.110a(3). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to a term of twenty-nine months to twenty years in prison. We affirm.

I

Defendant first argues that the trial judge erred in denying his motion for a directed verdict because the evidence was insufficient to establish the charged offense. We disagree. In ruling on a motion for a directed verdict, this Court views the evidence presented up to the time the motion was made in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements were proven beyond a reasonable doubt. *People v Crawford*, 232 Mich App 608, 615-616; 591 NW2d 669 (1998).

A conviction for second-degree home invasion requires proof of a breaking and entering a dwelling with the intent to commit a felony or larceny in the dwelling. *People v Warren*, 228 Mich App 336, 347-348; 578 NW2d 692 (1998), *aff'd in part, rev'd in part on other grounds* 462 Mich 415 (2000). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of a crime. *People v Nelson*, 234 Mich App 454, 459; 594 NW2d 114 (1999).

First, regarding the breaking element of the offense, the evidence viewed in the light most favorable to the prosecution established that defendant and his two companions were at the scene when the police arrived twenty-three minutes after receiving the dispatch. Testimony suggested that there were scrape marks on the ground underneath the main garage door, and the main garage door was off one of its tracks. There was a crowbar in plain view in defendant's vehicle.

Other alleged burglar tools were found in defendant's vehicle. The door connecting the attached garage to the interior of the house was kicked open. The footprint on the door was sufficient for a reasonable trier of fact to infer it belonged to one of defendant's companions, who fled the scene upon the arrival of the police. The wires to the alarm system in the house were cut, and the alarm was dangling off the wall, making a faint chirping sound. Viewed in a light most favorable to the prosecution, we conclude that this circumstantial evidence was sufficient to enable the jury to find beyond a reasonable doubt that a breaking occurred.

Second, regarding the entering element of the offense, the police officers that responded to the scene both testified that they saw defendant coming out of the garage and, thus, part of the dwelling.¹ One officer testified that defendant broke the plane of the garage, while the other officer testified that, had the garage door been closed, defendant would have been on the inside part of the garage, and that it was impossible for defendant to have been coming from anywhere else. Further, the evidence established that neither defendant nor his two companions had permission to enter the dwelling. Viewed in the light most favorable to the prosecution, we conclude that this evidence was sufficient to allow the jury to find beyond a reasonable doubt that defendant entered the dwelling. We reject defendant's argument that defendant was not "deep" within the garage. If any part of the defendant's body enters the building, the element of entering is satisfied. *People v Gillman*, 66 Mich App 419, 430; 239 NW2d 396 (1976).

Third, regarding the larcenous intent element of the offense, the prosecution must prove additional circumstances, beyond proof of a breaking and entering, that reasonably lead to the conclusion that the defendant intended to commit larceny. *People v Uhl*, 169 Mich App 217, 220; 425 NW2d 519 (1988). Because of the difficulty in proving an actor's state of mind, circumstantial evidence may be used to establish the element of intent. *People v Perez-DeLeon*, 224 Mich App 43, 59; 568 NW2d 324 (1997). Intent may be reasonably inferred from the nature, time and place of the defendant's acts before and during the breaking and entering. *Uhl*, *supra*.

Here, defendant maintains his innocence and argues that he had nothing to do with the actions of his two companions. The evidence viewed in the light most favorable to the prosecution established that defendant was found at the house, vacant of its owner, late at night. Defendant and his two companions had at least twenty-three minutes to be in the premises between the time the police received the alarm dispatch and the time police arrived at the scene. At least two rooms in the house were ransacked, expensive pieces of jewelry were missing, electronic equipment was found in a trash can in the kitchen, with the actual trash bag next to the trash can, and the police officers saw defendant exiting from within the right side of the garage - the same area where a CD player appeared to have been placed down in haste because its front was facing the ceiling. The moment the police arrived, one of defendant's companions fled the scene while the other was found in the living room, hiding under a blanket. There were alleged burglar tools in defendant's station wagon, and the vehicle's engine was running, but the headlights were out and the interior dome light was out by effect of a rag against the switch near

¹ MCL 750.110a(1)(a) defines "dwelling" as "a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter."

the opened back door of the station wagon. The jury could have considered all these facts in determining whether defendant had a larcenous intent. Viewed in the light most favorable to the prosecution, the evidence showing the nature, time and place of defendant's actions was sufficient for a reasonable jury to find the larcenous intent element of the charged offense proven beyond a reasonable doubt.

We reject defendant's argument that the evidence was insufficient because he was not in possession of any allegedly stolen items. The charged offense does not require proof of actual possession - it only requires proof of specific intent to commit a larceny within a dwelling. *Warren, supra* at 348. We also reject defendant's argument that the evidence was insufficient because the police failed to obtain fingerprints from the scene and, therefore, failed to offer direct evidence to place defendant inside the house or to show he actually touched anything there. It is not the duty of the police or the prosecution to exhaust all scientific means available in collecting evidence at the scene of a crime. *People v Barber*, 31 Mich App 106, 108; 187 NW2d 508 (1971). Here, the circumstantial evidence, as discussed above, was sufficient to allow the jury to reasonably infer that defendant was in the dwelling and had a larcenous intent, even in the absence of fingerprints. See *Nelson, supra*. Under these circumstances, the trial court did not err in denying defendant's motion for a directed verdict.

II

Defendant also argues that his trial counsel was ineffective because he failed to call as a witness, codefendant Nathan Ward, who would have corroborated defendant's testimony that defendant did not enter the dwelling and had no larcenous intent to commit the offense charged. We disagree. In order to succeed on an ineffective assistance of counsel claim, a defendant must show that his counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and that counsel's representation prejudiced the defendant so as to deprive him of a fair trial. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). In attempting to persuade this Court that counsel was ineffective, a defendant must overcome the presumption that the challenged action was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will this Court assess counsel's competence with the benefit of hindsight. *People v Pickens*, 446 Mich 298, 344; 521 NW2d 797 (1994).

Here, defense counsel testified that he did not call codefendant Ward as a witness for several reasons. Defense counsel believed Ward would seriously injure the defense, particularly when the jury found out that Ward had pleaded guilty to a charge brought in connection with this incident and had a criminal history. Defense counsel also avoided calling Ward to testify given several perceived problems with the case: police found Ward in a freshly ransacked house hiding under a blanket; the testimony of the police officers was consistent that valuable items were scattered in the garage and in certain rooms in the house; there was a freshly splintered door with pry marks and defendant's car contained a crowbar covered with fresh leaves; the burglar alarm was ripped off and dangling from the wall, making an audible beeping sound; the dome light in defendant's vehicle parked in front of the garage was made inoperable by a rag; one of the suspects fled the scene when the police arrived; and, the testifying police officers were certain defendant broke the plane of the garage. Furthermore, defense counsel stated that it would have been difficult to convince the jury to believe the words of a convicted criminal over

the testimony of the prosecution's eight witnesses. Also, Ward had a Fifth Amendment right to remain silent. He had pleaded guilty to the offense charged, as a fourth habitual offender, and was awaiting his sentencing at the time of defendant's trial. Defense counsel believed that, had he called Ward to testify, he would have guaranteed his client a speedy conviction, amounting to legal malpractice. Additionally, defendant himself testified that defense counsel's decision was "probably strategy." In light of the above, we conclude that defense counsel's decision not to call Ward was a matter of trial strategy.

Furthermore, the decision not to call Ward did not affect the outcome of the trial. The failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense - that is, one that might have made a difference in the outcome of the trial. *People v Duff*, 165 Mich App 530, 547; 419 NW2d 600 (1987). Since Ward was in the house, he could not have witnessed defendant's presence in the garage. Ward last saw defendant when defendant went to the back of the house. Even if the jury believed Ward's proposed testimony, that defendant had no larcenous intent and did not enter the garage, the jury still could have found that defendant developed such intent and actually entered the garage while Ward was in the house. Defendant failed to show that Ward's testimony would have affected the outcome of the trial. Accordingly, defendant has failed to overcome the presumption that his counsel afforded effective assistance.

Affirmed.

/s/ Brian K. Zahra

/s/ Michael R. Smolenski

/s/ Michael J. Talbot